

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ALLAN J. KROPF	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1982	:	
through February 29, 1984.	:	

Petitioner, Allan J. Kropf, 1259 Bloomingdale Road, Basem, New York 14013, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1982 through February 29, 1984 (File No. 803763).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 65 Court Street, Buffalo, New York, on February 2, 1989 at 1:15 P.M., with all briefs to be submitted by March 20, 1989. Petitioner appeared by Robert D. Kolken, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether the assessment herein was time barred by the statute of limitations set forth in Tax Law § 1147.

II. If not, whether the Division of Taxation properly determined that petitioner was a person required to collect sales taxes on behalf of Medina Ford-Mercury, Inc. within the meaning of Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

On April 17, 1986, the Division of Taxation issued to petitioner, Alan J. Kropf, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed \$50,384.04 in tax due, plus penalty and interest, for the period June 1, 1982 through February 29, 1984. The notice assessed tax due from petitioner "individually and as officer of Medina Ford-Mercury, Incorporated".

The assessment set forth in the April 17, 1986 notice of determination was subsequently revised to \$19,622.71 in tax due, plus penalty and interest, for the period June 1, 1982 through November 30, 1982. This assessment was premised upon sales tax reported due in quarterly sales tax returns filed by Medina Ford-Mercury, Inc., for the periods ended August 31, 1982 and November 30, 1982. Said returns were late filed, without payment, by Medina Ford-Mercury, Inc.

In or about October 1981, petitioner and one Lorne McMurray formed Medina Ford-

Mercury, Inc. The corporation issued 100 shares of stock to its shareholders as follows: 51 shares to Mr. McMurray and 49 shares to petitioner. Mr. McMurray became the corporation's president and treasurer while petitioner became the corporation's vice-president and secretary.

Petitioner contributed \$15,000.00 to the corporation upon its formation. Mr. McMurray agreed to contribute the same amount, but did not.

Medina Ford-Mercury, Inc. was a new car dealership which began doing business in October 1981. The corporation employed petitioner and Mr. McMurray, and also a salesman, a bookkeeper, and (at various times) one or two mechanics.

Petitioner ran the service department of the dealership. In that capacity he repaired cars, supervised the other mechanic(s), ordered and sold spare parts, and handled customer transactions. Petitioner charged sales tax on all repairs performed by the service department and turned all receipts received by him over to the corporation's bookkeeper. All payments for parts petitioner ordered were paid by the corporation's bookkeeper. Petitioner was involved in the hiring of mechanics and had authority to fire a mechanic, if necessary. Petitioner had no involvement in the hiring and firing of the other employees.

Mr. McMurray handled the balance of the corporation's day-to-day operations. He sold cars and also supervised the corporation's other salesman. He was responsible for the hiring and firing of the salesmen and the bookkeeper. He was involved in the hiring of the mechanics. He was also in charge of the corporation's financial matters and the maintenance of its books and records, as he supervised the corporation's bookkeeper and determined which of the corporation's creditors were to be paid. Checks drawn on the corporation's bank account were drawn up by the bookkeeper under his direction. Mr. McMurray was also generally responsible for the preparation and filing of tax returns. Such returns, including sales tax returns, were prepared by the bookkeeper at Mr. McMurray's direction. Mr. McMurray signed the vast majority of all such returns. Finally, Mr. McMurray was responsible for the deposit of the corporation's receipts into its bank account.

Petitioner was not involved in determining which of the corporation's bills were to be paid.

Both petitioner and Mr. McMurray were paid a weekly salary of \$350.00 during the period at issue.

The corporation operated out of premises owned by Mr. McMurray located at 1405 S. Main Street, Medina, New York. The corporation paid Mr. McMurray rent for these premises. Petitioner had no part in determining the amount of rent paid to Mr. McMurray for the premises.

Mr. McMurray and petitioner were both authorized to sign checks on the corporation's behalf. Mr. McMurray signed the vast majority of the hundreds of checks drawn on the corporation's account annually.

Petitioner signed a few dozen corporate checks per year. He signed checks in Mr. McMurray's absence when asked to do so by the bookkeeper. Petitioner signed at least one check for payment of sales taxes, a \$2,569.14 check dated December 18, 1981. Petitioner also signed at least one check payable to the Internal Revenue Service.

Petitioner signed the corporation's sales tax return for the period ended August 31, 1982. Petitioner was not involved in the preparation of this return, which was dated April 4, 1983 and stamped received by the Rochester District Office of the Division of Taxation on April 22, 1983.

Petitioner may have signed other returns of the corporation. At hearing petitioner stated that he did not know if he had signed any other returns. At no time did petitioner mail any returns.

In October 1981, petitioner and Mr. McMurray, as officers of the corporation, authorized the corporation to borrow \$50,000.00 from the Small Business Administration. The corporation subsequently did borrow \$50,000.00 from the S.B.A. and, under the terms of the loan agreement, petitioner incurred personal liability for at least some portion of the corporation's indebtedness. Following the corporation's demise, petitioner personally repaid a portion of the loan proceeds back to the S.B.A.

In May 1983, petitioner and Mr. McMurray attended a meeting at the Division's Rochester District Office. At that meeting petitioner first became aware that the corporation was in arrears with respect to its sales tax obligations (including the period at issue herein). Mr. McMurray had been aware of the corporation's sales tax problems prior to this meeting as he had previously been in contact with Division personnel regarding these problems. He did not, however, advise petitioner of these problems. At the meeting, petitioner and Mr. McMurray executed, on the corporation's behalf, a Deferred Payment Agreement whereby the corporation conceded liability for sales tax assessments for certain periods (including the periods at issue herein) and agreed to a payment schedule for that liability.

By his execution of the Deferred Payment Schedule, petitioner did not intend to concede that he was a responsible officer of the corporation for sales tax purposes.

After learning of the corporation's sales tax problems, petitioner made a few casual inquiries of the bookkeeper as to whether "things were being taken care of here", *i.e.*, if the corporation was making its payments as required under the deferred payment agreement. The record is unclear as to precisely how the bookkeeper responded to petitioner's inquiries. The record is also unclear as to how specific petitioner's inquiries were. It is clear, however, that the bookkeeper did not specifically advise petitioner that the corporation was not complying with the deferred payment agreement. The bookkeeper believed that Mr. McMurray did not want petitioner (or anyone) to know the status of the corporation's finances. In fact, the corporation did not make payments as agreed under the deferred payment agreement.

Mr. McMurray was secretive regarding the corporation's finances. He regularly locked up the corporation's records and instructed the bookkeeper not to allow anyone access to those records. There is no evidence in the record that petitioner ever requested access or was ever denied access to the corporation's books and records.

At no time did Mr. McMurray advise petitioner that the corporation was not fulfilling its obligations under the deferred payment agreement. Additionally, the record does not reveal that Mr. McMurray deceived petitioner regarding the corporation's financial status or its status under the deferred payment agreement.

Prior to his involvement with Medina Ford-Mercury, Inc., petitioner ran his own automotive repair business. Petitioner's wife, and later, his son, handled the bookkeeping chores for that business, including the preparation of sales tax returns. Petitioner signed all sales tax returns for that business. Later, during the period of his involvement with Medina Ford-Mercury, petitioner continued to run his automotive repair business, but he devoted no time to that business and earned no income from that business because of his full-time employment with Medina Ford-Mercury, Inc.

Medina Ford-Mercury, Inc. ceased doing business in February 1984.

The Division was unable to produce the corporation's sales tax return for the period ended November 30, 1982. Petitioner was unable to produce a copy of said return. The Division's records indicated that the November 30, 1982 return was filed on April 22, 1983.

The Division reviewed its files to locate an envelope in which the sales tax returns of Medina Ford-Mercury for the periods at issue herein may have been mailed to the Division. The Division was unable to locate any such envelope.

The Division presented no evidence of its procedures regarding receipt of sales tax returns at its Rochester District Office.

The Division further reduced the assessment herein by \$6,097.76 based upon a payment in that amount made by Mr. McMurray on or about October 20, 1987.

CONCLUSIONS OF LAW

A. Tax Law § 1147(b) provides that, "no assessment of additional tax shall be made after the expiration of more than three years from the date of filing of a return" with exceptions not relevant herein. Petitioner contends that the notice of determination herein was time barred under this section and therefore must be cancelled. Petitioner asserts that the sales tax returns for the two periods in question were mailed on April 4, 1983 and that the notice of determination was therefore untimely. The Division's records indicate that the returns in question were received on April 22, 1983. Neither the corporation's sales tax return for the period ended November 30, 1982 nor the envelope in which the returns were purportedly mailed to the Division were introduced into the record.

B. Sales tax returns are, generally, filed upon receipt by the Division. 20 NYCRR 535.1(b) sets forth mailing rules for sales tax documents which provide for deemed dates of receipt of such documents by the Division provided that the documents are mailed in accordance with the requirements set forth in said regulation. In order for these mailing rules to apply, however, petitioner must establish that the sales tax returns in question were, in fact, mailed in accordance with the requirements of 20 NYCRR 535.1(b). Absent such proof, the returns must be considered filed upon receipt.

C. Petitioner has failed to establish that Medina Ford-Mercury, Inc.'s sales tax returns for the periods ended August 31, 1982 and November 30, 1982 were mailed on April 4, 1983. The evidence presented to prove this contention consisted primarily of the testimony of the corporation's bookkeeper during the period February 1983 through February 1984. A review of this testimony reveals that this witness did not testify that she specifically recalled mailing the returns in question. Rather, this witness concluded that she mailed the returns in question on April 4, 1983 based upon the April 4, 1983 date on the August 31, 1982 return and the presence of petitioner's signature on said return. The bookkeeper believed that petitioner had signed and dated the return, and, based upon her understanding of the corporation's business practices, the only reason that petitioner would have signed and dated the return was if the return had to be mailed on that particular day. It is concluded that the bookkeeper's testimony is simply insufficient to establish that the returns in question were mailed on April 4, 1983. Moreover, no evidence was presented as to whether the returns in question bore a metered mail stamp or a U.S. postal service stamp; no specific evidence was presented as to whether the returns were mailed postpaid via the United States Postal Service; and no evidence was presented as to whom the envelope containing the returns was addressed.

Accordingly, it is concluded that petitioner has failed to establish that the returns in question were mailed on April 4, 1983, and has further failed to establish that the returns were

mailed in accordance with the provisions of 20 NYCRR 535.1(b). The returns in question were therefore filed upon receipt by the Division. The record indicates that said returns were received on April 22, 1983. The notice in question, issued on April 17, 1986, was therefore not time-barred pursuant to Tax Law § 1147(b) inasmuch as it was issued within three years of the date of filing of the return.

It is noted that the envelope containing the returns in question, the best evidence of when and how the returns in question were filed, was not introduced into the record herein. While it may appear, at first, as unfair that the absence of such evidence weigh against petitioner, where the Division was (in all likelihood) last in possession of such an envelope, it must be remembered that the corporation could have protected itself (and petitioner) from any such disadvantage by mailing the returns in question by registered or certified mail.

D. Tax Law § 1133(a) imposes personal liability for taxes required to be collected under Article 28 of the Tax Law upon a person required to collect such tax. A person required to collect such tax is defined as "any officer, director or employee of a corporation...who as such officer, director or employee is under a duty to act for such corporation...in complying with any requirement of [article 28]" (Tax Law § 1131[1]). The determination that an individual is a responsible officer depends upon the particular facts of each case (Stacy v. State, 82 Misc 2d 181, 183; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988). The relevant factors to consider when determining whether a person has such a duty to act for the corporation include, *inter alia*, status as an officer, director or shareholder, authorization to sign the corporate tax return, responsibility for management or maintenance of the corporate books, authorization to hire and fire employees and derivation of substantial income from the corporation or stock ownership (see, 20 NYCRR 526.11[b][2]; Matter of Cohen v. State Tax Commn., 128 AD2d 1022; Matter of Blodnick v. State Tax Commn., 124 AD2d 437; Matter of Rosenblatt v. State Tax Commn., 114 AD2d 127, revd in part on dissenting opn below 68 NY2d 775).

E. Applying these criteria to the facts herein, it is determined that petitioner was a person required to collect sales tax on behalf of Medina Ford-Mercury, Inc. during the period at issue. Petitioner was a 49% shareholder of the corporation and was its vice-president and secretary. He invested \$15,000.00 in the corporation. He incurred personal liability on the corporation's \$50,000.00 loan from the S.B.A. During the period at issue, all of petitioner's income was derived from the corporation. He managed the service department of the corporation on a daily basis. He was authorized to sign checks on the corporation's behalf and he exercised that authority by signing a few dozen checks per year in Mr. McMurray's absence. Petitioner also had experience in running a business and was aware of the corporation's responsibility to file sales tax returns. Subsequent to the period at issue herein, petitioner became involved in the corporation's sales tax difficulties with the Division and, along with Mr. McMurray, executed a deferred payment agreement on its behalf. Finally, and perhaps most significantly, he signed the corporation's sales tax return for the period ended August 31, 1982 and he did not dispute that he signed the corporation's sales tax return for the period ended November 30, 1982. In fact, petitioner took the position that, in all probability, he had signed the November 30, 1982 return given the fact that the returns for both of the periods at issue were received by the Division on the same day.

Although he signed a few dozen checks per year, petitioner was not actively involved in determining which of the corporation's creditors were to be paid, nor was he involved in the maintenance of the corporation's books and records or the preparation of sales tax returns. While it thus appears from the record that petitioner and Mr. McMurray generally divided the day-to-day responsibilities of running the corporation so that Mr. McMurray was responsible for the day-to-day finances, such a general division of duties does not diminish petitioner's status as a responsible officer pursuant to the criteria set forth above. Petitioner contended that, as a result of this division of responsibility, he had no knowledge of or responsibility for the

corporation's financial affairs, and no knowledge that sales taxes were not being paid, and therefore could not have been a responsible officer of the corporation during the period at issue herein. Petitioner's position, however, overlooks the fact that petitioner signed one of the returns at issue and that petitioner concedes that he probably signed the other. Certainly, in view of his extensive involvement with the corporation and his previous business experience, by signing (at least one of) the returns petitioner knowingly undertook a "duty to act" on the corporation's behalf with respect to its sales tax obligations (Tax Law § 1131[1]). By signing the returns, petitioner fulfilled a part of that duty. By his failure to see to it that the amounts reported on the returns were paid, petitioner failed to complete his duty to see to it that the corporation paid its reported sales tax liability pursuant to Tax Law § 1137.

While it appears that petitioner may not have been fully aware of the corporation's daily status vis à vis its sales tax and other financial obligations, the record is also clear that petitioner made little, if any, effort to see to it that the corporation fulfilled such obligations. Even after petitioner learned that the corporation was in arrears with respect to its sales taxes, he made what appear to be, at best, cursory efforts to see to it that the corporation was making the required payments under the deferred payment agreement. At no time did petitioner even make any effort to review the corporate books and records. Further, while Mr. McMurray was secretive regarding the corporation's records, there is no evidence that he at any time deceived petitioner with respect to the corporation's financial obligations, nor is there any evidence that Mr. McMurray or the bookkeeper ever denied petitioner access to the corporation's books and records. "A corporate official responsible as a fiduciary for tax revenues cannot absolve himself merely by disregarding his duty and leaving it to someone else to discharge (Hornsby v. Internal Revenue Service, 588 F2d 952, 953)." (Gardineer v. State Tax Commn., 78 AD2d 928, 433 NYS 2d 242, 244.)¹ Based upon the record, it appears that petitioner abandoned his duty to act on the corporation's behalf and left it to Mr. McMurray and the corporation's bookkeeper to discharge.

Accordingly, the Division properly determined that petitioner was a person required to collect tax on behalf of Medina Ford-Mercury, Inc. pursuant to Tax Law § 1131(1) and was therefore properly liable pursuant to Tax Law § 1133(a) for taxes required to be collected by said corporation.

F. Petitioner cites Matter of Robert Hess, Officer of Bill & Walt's Service Center, Inc. (State Tax Commn., January 28, 1986) in support of his position. That case is factually distinguishable from the instant matter in several respects. First, petitioner had a greater financial interest in his

corporation than Mr. Hess had in his. Most notably, petitioner herein incurred personal liability on the \$50,000.00 SBA Loan and also contributed \$15,000.00 of capital. Mr. Hess contributed \$10,000.00 in capital to his corporation. Petitioner had knowledge that the corporation was having difficulties in meeting its sales tax obligations and agreed, along with Mr. McMurray, to rectify the situation. Petitioner held two corporate offices and was a 49% shareholder. Mr. Hess was never "officially" an officer or stockholder of his corporation. Finally, Mr. Hess did not sign any tax returns. Petitioner signed the sales tax return for one of the periods at issue and did not deny that he signed the sales tax return for the other period at issue. These factual differences compel the different results reached in Matter of Robert Hess and the instant matter.

¹The cited case involves officer responsibility for payment of withholding taxes pursuant to Tax Law § 685(g). However, since withholding taxes and the sales taxes herein are both trust fund taxes imposing fiduciary responsibilities, the principle set forth in the cited case is applicable to the instant matter (see Blodnick v. State Tax Commn., *supra*).

G. The petition of Allan J. Kropf is in all respects denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due, dated April 17, 1986, as adjusted pursuant to Findings of Fact "2" and "26", is sustained.

DATED: Troy, New York
October 12, 1989

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE